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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/215,951	12/18/1998	JOSEPH P. FELL	659/489	1434

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EXAMINER

CHEVALIER, ALICIA ANN

ART UNIT	PAPER NUMBER
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1772

DATE MAILED: 01/25/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/215,951

Applicant(s)

FELL ET AL.

Examiner

Alicia Chevalier

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 07 November 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 48-50 is/are pending in the application.
- 4a) Of the above claim(s) 1-12 and 14-18 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 48-50 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **RESPONSE TO AMENDMENT**

1. Claims 48-50 are pending in the application.

Claims 1-12 and 14-18 must be cancelled since matters concerning claims 1-12 and 14-18 have been by closed in view of the BPAI's decision mailed 30, 2004. MPEP 1214.06, section III.

2. Amendments to the claim 50, filed on Nov. 7, 2005, has been entered in the above-identified application.

### ***REJECTIONS***

3. **The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.**

### ***Claim Rejections - 35 USC § 103***

4. Claims 48-50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith (U.S. Patent No. 5,209,801) in view of Vander Wielen et al. (U.S. Patent No. 4,720,415).

Smith discloses a disposable elastic structure for use as sweat bands, bandages, athletic supporters, support straps for incontinence devices and the like (*col. 1, lines 26-29*).

Regarding Applicant's claim 48, Smith disclose discloses a stretchable composite material comprising a first layer of breathable material (*nonwoven layer, col. 5, line 32 and figure 6*), a second layer of breathable material (*nonwoven layer, col. 5, line 32 and figure 6*), at least two elastic members (*elastic strands, col. 5, line 34*) positioned in between the first and

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second layers (*figure 6*). The composite further comprises regions of securement comprising attached zones (*adhesive layer, col. 5, line 31*) securing the elastic members, the first layer and second layer (*figure 6*). The attached zones extending traverse and across a majority of the elastic members (*figure 6*).

Smith fails to disclose that the stretchable material has a maximum elongation of at least about 85% of the elongation of the elastic members.

Vander Wielen discloses a composite elastic material for use in protective covers and wraps, outerwear, undergarments, menstrual and incontinence control articles and garments such as disposable diapers (*col. 21, lines 52-57*). The composite elastomeric material comprises an elastic web held in tension sandwiched between two gatherable webs and bonded together (*figure 2a*). Gather form in the unbonded sections of the gatherable webs after the tension is released in the elastic web (*col. 13, line 15 to column 14, line 68*).

Vander Wielen further discloses that the stretchable composite material elongation is dependent on the amount the elastic web is stretched, i.e. if it is desired to prepare a composite material stretchable to 100 percent elongation, a 100 cm length of elastic web may be stretched to a length of, for example 220 cm (120 percent elongation) and bonded at spaced-apart locations to a 220 cm length of non-elastic material (*col. 9, lines 24-60*).

Smith and Vander Wielen are analogous because they both disclose stretchable composites for use in incontinence articles.

The exact maximum elongation of the composite is deemed to be a cause effective variable with regard elongation of the elastic member when bonded to the nonelastic webs. It would have been obvious to one having ordinary skill in the art to have determined the optimum

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value of a cause effective variable such as maximum elongation of the composite, as similarly taught by Vander Wielen, through routine experimentation in the absence of a showing of criticality in the claimed maximum elongation. *In re Boesch*, 205 USPQ 215 (CCPA 1980), *In re Woodruff*, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990). It is desirable to have a high maximum elongation, such as 85% or higher, because the more the structure can elongate the longer the structure becomes in length and is capable of surrounding bigger items. This enables the elastic structure to fit a wider variety of shapes and sizes.

Regarding Applicant's claim 49, Smith discloses that the composite material further comprises a stiffened edge, since the reference discloses that the edges contain side straps (*col. 6, line 13*). The side straps are deemed to make the edges stiffer than the middle section since they have an extra layer added to the edges only.

Regarding Applicant's claim 50, Smith discloses an article of apparel comprising the composite material (*incontinence articles, col. 1, lines 26-29*).

#### ***ANSWERS TO APPLICANT'S ARGUMENTS***

5. Applicant's arguments in the response filed November 7, 2005 regarding the 35 U.S.C. 103(a) rejection over Smith in view of Vander Wielen of record have been carefully considered but are deemed unpersuasive.

Applicant's arguments regarding the limitation "wherein the stretchable composite material has a maximum elongation of at least about 85% of the elongation of the elastic members" is moot due to the Board of Appeals decision, mailed December 30, 2004.

Applicant argues that the references do not teach “regions of securement securing the elastic members, first and second layers,” “the regions of securement further comprising attached zones,” and “the attached zones extending traverse and across a majority of the elastic members.”

The Examiner disagrees. As stated above, Smith’s composite comprises regions of securement comprising attached zones (*adhesive layer, col. 5, line 31*) securing the elastic members, the first layer and second layer (*figure 6*). The attached zones extending traverse and across a majority of the elastic members (*figure 6*). It is clear that the adhesive in Smith provides regions of securement that are attached zones and from figure 6 the adhesive extends traverse across a majority of the elastic members.

Applicant further argues that Vander Wielen does not disclose attached zones.

The examiner never stated or relied upon Vander Wielen to disclose the limitation of attached zones. Vander Wielen was only relied upon to teach that the maximum elongation of the composite is a cause effective variable with regard elongation of the elastic member when bonded to the nonelastic webs.

Applicant argues that Smith fails to disclose the “stiffened edge” claimed in claim 49. Also, that Smith does not teach that the side straps make the edges of the composite material stiffer than the middle section.

As stated above, Smith discloses that the composite material further comprises a stiffened edge, since the reference discloses that the edges contain side straps (*col. 6, line 13*). The side

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straps are deemed to make the edges stiffer than the middle section since they have an extra layer added to the edges only.

Furthermore, the limitations “stiffened edge” is a functional limitations, e.g. is an attempt to define something by what it does, rather than by what it is (e.g., as evidenced by its specific structure or specific ingredients). MPEP 2173.05(g). The fact that Smith does not explicitly state the strap stiffens the edge is irrelevant. The fact remains that a strap at the edge of the composite will make the edge stiffer then the center of the composite.

### ***Conclusion***

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alicia Chevalier whose telephone number is (571) 272-1490. The examiner can normally be reached on Monday through Friday from 8:00 am to 4:00 pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached on (571) 272-1498. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



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1/18/06



**ALICIA CHEVALIER  
PRIMARY EXAMINER**